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Article (Accepted Version)

Berry, Stephanie (2017) Democracy and the preservation of minority identity: fragmentation within the European human rights framework. *International Journal on Minority and Group Rights*, 24 (3). pp. 205-228. ISSN 1385-4879

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Democracy and the Preservation of Minority Identity: Fragmentation within the European Human Rights Framework

Stephanie E. Berry

Abstract

The international human rights (IHR) and international minority rights (IMR) regimes have very different origins. However, the two regimes converged in the 20th century, and IMR are now understood to be a sub-regime of IHR. This article argues that the different historical origins of the two regimes impact how actors within each regime interpret their *mission*, and have resulted in institutional fragmentation within the Council of Europe. The *mission* of the European Court of Human Rights is the promotion and protection of democracy, whereas the Advisory Committee to the Framework Convention for the Protection of National Minority's *mission* is the preservation of minority identity. In practice, this has led to conflicting interpretations of multi-sourced equivalent norms. It is suggested that inter-institutional dialogue provides an avenue through which these conflicting interpretations can be mediated.

Keywords

fragmentation; minority rights; European Convention on Human Rights; Framework Convention for the Protection of National Minorities; security; democracy

1 Introduction

While the international human rights (IHR) regime was founded in the aftermath of the Second World War with a view to preventing a repeat of the atrocities witnessed in that context,¹ international minority rights (IMR) have historically been understood as a conflict prevention mechanism and have existed in international law, in various forms, since the Peace Treaties of the 16th and 17th centuries.² Despite these different historical origins, at an international level, the IHR and IMR regimes³ converged in

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¹ Statement of Mr Malik (Lebanon) in GA, 145th Plenary Meeting 27 September 1948 U.N. doc A/PV.145, p.189.

² The Peace of Augsburg 1555; The Peace of Westphalia 1648; G. Pentasuglia *Minorities in International Law: An Introductory Study* (Council of Europe Publishing, Strasbourg, 2002) p. 25.

³ “[R]egimes are sets of norms, decision-making procedures and organisations coalescing around functional issue-areas”. M. Young, ‘Introduction: The Productive Fiction between Regimes’, in M.A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (CUP,

the 20th century and, in terms of both normative content⁴ and institutional mandate⁵ significant overlap can be observed. Specifically, the International Covenant on Civil and Political Rights contains a minority rights provision.⁶ The only legally binding IMR instrument, the Framework Convention for the Protection of National Minorities (FCNM),⁷ falls within the auspices of the Council of Europe and is understood to be an IHR instrument. Yet, IMR standards have also been elaborated by the Organization for Security and Co-operation in Europe, with the aim of preventing ethnic conflict.⁸ Thus, IMR do not always fit squarely within the broader IHR framework.

This article explores fragmentation within the Council of Europe between the specialised FCNM and the generalist European Convention on Human Rights (ECHR).⁹ Both instruments contain analogous norms¹⁰ and pursue the goals of ‘international peace and security’, and ‘liberal justice’.¹¹ Nonetheless, this article argues that fragmentation has arisen between the institutions tasked with implementing these instruments, the Advisory Committee to the Framework Convention for the Protection of National Minorities (AC-FCNM) and the European Court of Human Rights (ECtHR). Specifically, the different historical origins of IHR and IMR have influenced the “behaviours, assumptions and biases”¹² of actors within each institution. This has resulted in the evolution of different institutional missions: the ECtHR views *democracy* as central to the achievement of the goals of the ECHR, whereas, the AC-FCNM views the *preservation of minority identity* as central to the achievement of the goals of the FCNM. Thus, while *goals* pertain to the purpose of specific instruments, *missions* pertain to how the institutions tasked with their implementation understand that these goals are to be achieved in practice. The identified diverging missions of the AC-FCNM and ECtHR have resulted in institutional fragmentation, that is, conflicting interpretations of multi-sourced equivalent norms (MSENs).¹³

Cambridge, 2012) p. 11

⁴ See, for example, Articles 7, 8, 9, 10 FCNM and Articles 9, 10, 11 ECHR.

⁵ The Council of Europe and the UN Office of the High Commissioner for Human Rights.

⁶ Article 27 International Covenant on Civil and Political Rights 999 U.N.T.S. 171, entered into force 23 March 1976. See also, UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities U.N. doc. A/RES/47/135.

⁷ Framework Convention for the Protection of National Minorities CETS No 157, entered into force 1 February 1998 [FCNM].

⁸ See, for example, OSCE High Commissioner for National Minorities, ‘The Hague Recommendations Regarding the Education Rights of National Minorities and Explanatory Note’ (October 1996); OSCE High Commissioner for National Minorities, ‘The Lund Recommendations on the Effective Participation of National Minorities in Public Life and Explanatory Note’ (September 1999); OSCE High Commissioner for National Minorities, ‘The Ljubljana Guidelines on Integration of Diverse Societies & Explanatory Note’ (November 2012).

⁹ European Convention on Human Rights *opened for signature* 4 November 1950, 213 U.N.T.S. 221, Eur. T.S. No. 5 (*entered into force* 3 September 1953) [ECHR].

¹⁰ The fundamental freedoms, the prohibition on discrimination and a right to preserve a way of life.

¹¹ Preamble ECHR; Preamble FCNM.

¹² Young, *supra* note 3, p. 11.

¹³ MSENs are “two or more norms which are (1) binding upon the same legal subjects; (2) similar or identical in their normative content; and (3) have been established through different international instruments or “legislative” procedures or are applicable in different substantive areas of the law”. T. Broude and Y. Shany, ‘The International Law and Policy of Multi-Sourced Equivalent Norms’ in T. Broude and Y. Shany (eds.), *Multi-Sourced Equivalent Norms in International Law* (Hart Publishing, Oxford, 2011) p. 5.

By identifying the potential systemic causes of institutional fragmentation between the ECtHR and AC-FCNM and evaluating the direct impact of these factors on the interpretation of MSENs, this article sheds light on an unexplored aspect of the relationship between the two institutions. While some divergence between generalist and specialised regimes is to be expected, in this instance, the ECtHR's prioritisation of majoritarian democracy undermines the preservation of minority identity. This is problematic because States are likely to prioritise the least onerous interpretation of their obligations.¹⁴ Thus, the interpretation of rights by the ECtHR has the potential to delegitimise the work of the AC-FCNM. Consequently, the reconciliation of the competing missions of the two regimes is desirable to prevent the ECtHR from becoming a hegemonic regime.

This article first explores the potential causes of institutional fragmentation between the ECtHR and AC-FCNM, by identifying systemic divergence and unpacking how the historical origins of the two regimes impact the missions of the two institutions. Second, the implications of these missions for the interpretation of MSENs, in practice, is explored. While the two regimes converge in relation to 'democratic rights', significant divergence can be observed in relation to rights that pertain to the preservation of minority identity. Finally, this article considers whether it is possible to reconcile the missions of the ECtHR and AC-FCNM. While resort to the normal rules of treaty interpretation does not appear to be advantageous, the pragmatic approach of inter-institutional dialogue may hold some merit.

2 *Institutional Fragmentation: The ECtHR and AC-FCNM*

Fragmentation in the context of public international law usually denotes the development of incompatible norms within different treaties or specialised regimes.¹⁵ IHR and IMR do not contain incompatible norms in this sense. In fact, the two instruments that form the focus of this article, the ECHR and FCNM, contain a number MSENs, including the fundamental freedoms,¹⁶ the prohibition on discrimination¹⁷ and both encompass a right to preserve a way of life.¹⁸ Although this normative overlap reduces the potential for direct norm conflict, these standards "retain their *separate existence*".¹⁹ Linxinski suggests that, in the context of IHR, "most of the variation is restricted to the bureaucratic and institutional apparatuses created by each of these instruments".²⁰ Thus, despite the absence of directly

¹⁴ C. Charters, 'Multi-Sourced Equivalent Norms and the Legitimacy of Indigenous Peoples' Rights under International Law' Broude and Shany (eds.), *supra* note 136, p. 300.

¹⁵ See generally, C.W. Jenks, 'Conflict of Law-Making Treaties' 30 *British Year Book of International Law* (1953) 401-53; Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (U.N. doc. A/CN.4/L.682) <legal.un.org/ilc/documentation/english/a_cn4_l682.pdf>.

¹⁶ Articles 7, 8, 9, 10, 11 FCNM; Articles 9, 10, 11 ECHR.

¹⁷ Article 4 FCNM; Article 14 ECHR and Protocol 12 ECHR.

¹⁸ Article 5 FCNM; *G. and E. v. Norway*, 3 October 1983, ECtHR, Judgment, p. 35, <hudoc.echr.coe.int/eng?i=001-74157>; *Chapman v. United Kingdom*, 18 January 2001, ECtHR, Judgment, para. 96, <hudoc.echr.coe.int/eng?i=001-59154>.

¹⁹ A. Rachovitsa, 'The Principle of Systemic Integration in Human Rights Law - A Critical Appraisal', forthcoming *International and Comparative Law Quarterly* (2017) p. 3 [accessed via First View].

²⁰ L. Linxinski, 'Comparative International Human Rights Law: An Analysis of the Right to Private

conflicting norms, the potential for institutional fragmentation remains, if the ECtHR and AC-FCNM interpret MSENs incompatibly. A number of factors have the potential to result in institutional fragmentation, including “the distinct political, normative and institutional environments in which they function”.²¹ This section suggests that the causes of fragmentation between the AC-FCNM and ECtHR include the nature of the norms, the mandates of these institutions and, finally, the structural biases of actors within each institution.

2.1 Norms and Mandates

At the outset, it must be acknowledged that the general nature of the ECHR, compared to the specialised nature of the FCNM impacts the scope and focus of the norms contained in each instrument. Although both the ECHR and FCNM contain ‘binding’ norms, they are binding to different degrees. The ECHR contains justiciable minimum standards, whereas the FCNM contains ‘programmatic rights’ that permit States “a measure of discretion in the implementation”.²² This has led to criticism of the FCNM on the basis that “it is not incisive enough to afford effective protection to minorities”.²³ Although the *sui generis* nature of the ECHR²⁴ has led the ECtHR to permit States a margin of appreciation, specifically in the context of the identified MSENs,²⁵ this pertains to the scope of the limitations clause rather than the scope and content of substantive rights. Thus, while a number of the rights contained in the ECHR and FCNM appear to align, these distinctions ultimately mean that there can never be true normative equivalence.

The nature of the standards contained in the ECHR and FCNM also influences the mandate of their respective monitoring bodies. The ECtHR is able to issue binding judgments. Yet, before it can consider a particular situation, an admissible case be brought before it. In practice this has prevented it from considering situations identified by the AC-FCNM as problematic.²⁶ Furthermore, the ECtHR can only consider the individual circumstances of a case, rather than the general situation prevailing in a State. This can inhibit the identification of laws, policies and practices that are incompatible with Convention standards.²⁷ The ECtHR’s mandate is also

and Family Life across Human Rights “Jurisdictions” 32:2 Nordic Journal of Human Rights (2014) 99, p. 100.

²¹ Broude and Shany, *supra* note 13, p. 8.

²² Council of Europe, *Framework Convention for the Protection of National Minorities and Explanatory Report* (February 1995) H(1995)010 paras. 11 and 17.

²³ PACE, ‘Report on an additional protocol to the European Convention on Human Rights and national minorities’, Committee on Legal Affairs and Human Rights, Doc. 12879, 23 February 2012, para. 21 <www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=13083&lang=en>.

²⁴ A. Drzemczewski ‘The *Sui Generis* Nature of the European Convention on Human Rights’ (1980) 29 ICLQ 54 at 54.

²⁵ S. E. Berry, ‘A Tale of Two Instruments: Religious Minorities and the Council of Europe’s Rights Regime’, 30:1 *Netherlands Quarterly of Human Rights* (2012) pp. 19-22

²⁶ See, for example, *Ouardiri v. Switzerland*, 8 July 2011, ECtHR, Admissibility Decision <hudoc.echr.coe.int/eng?i=002-504>; Council of Europe, Framework Convention Advisory Committee, *Third Opinion on Switzerland* (5 March 2013) ACFC/OP/III(2013)001 para. 63 <www.coe.int/en/web/minorities/switzerland>.

²⁷ *V.C. v. Slovakia*, 8 November 2011, ECtHR, Judgment, para. 177, <hudoc.ECHR.coe.int/sites/eng/pages/search.aspx?i=001-107364> Cf. Council of Europe, Framework Convention Advisory Committee, *Third Opinion on the Slovak Republic* (28 May

limited by the inherent nature of the adversarial process, which only identifies the border at which minimum standards are breached.²⁸ States are not incentivised to improve human rights protection beyond the floor of rights established by the ECHR.²⁹

Although the rights contained in the FCNM are relatively weak, the AC-FCNM is able to maximise the content of these rights through the State reporting process.³⁰ By assessing the prevailing situation in a State, the AC-FCNM is able to adopt a more holistic approach which facilitates the identification of on-going and potential situations of concern. Thus, the AC-FCNM adopts a more preventative role than the ECtHR. Nonetheless, its Opinions on State reports at best constitute ‘soft law’,³¹ as compared to the ECtHR’s binding legal interpretations. Yet, it can be argued that the AC-FCNM’s interpretation of the standards contained in the FCNM establishes a normative expectation.

The identified distinctions between the nature of rights contained in the ECHR and FCNM and the mandates of their respective monitoring bodies can, in practice, result in different interpretations of MSENs. This is not problematic *per se*. If diverging interpretations can be explained by reference to factual differences such as institutional mandates,³² they might not constitute *legal* fragmentation.³³ Nonetheless, conflicting interpretations of MSENs can still undermine institutional legitimacy, coherence and transparency. In the given context, the minimalist interpretations of MSENs by the ECtHR have the potential to undermine the maximalist interpretations of similar provisions by the AC-FCNM, as States can use conflicting interpretations of MSENs to justify only complying with the least onerous interpretation of their obligations.³⁴ This danger is particularly acute as the AC-FCNM has a weak enforcement structure.³⁵

2.2 Structural Bias

The interpretation of MSENs is influenced by the preferences of actors within each regime and, specifically, “what the relevant institution understands as its mission, its

2010) ACFC/OP/III(2010)004, paras. 53-54, <www.coe.int/en/web/minorities/slovak-republic>.

²⁸ E. Brems, ‘Human Rights: Minimum and Maximum Perspectives’, 9:3 *Human Rights Law Review* (2009) p. 350.

²⁹ *Ibid.*, p. 354.

³⁰ S. E. Berry, ‘The Siren’s Call? Exploring the Implications of an Additional Protocol to the European Convention on Human Rights on National Minorities’ 23:1 *International Journal on Minority and Group Rights* (2016) p. 7.

³¹ R. Hofmann, ‘The Impact of International Norms on the Protection of National Minorities in Europe: The Added Value and Essential Role of the Framework Convention for the Protection of National Minorities’, DH-MIN(2006)018, p. 27, <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680097f38>>.

³² O. Salát, ‘Comparative Freedom of Assembly and the Fragmentation of International Human Rights Law’ 32:2 *Nordic Journal of Human Rights* (2014), p.153.

³³ M. Payandeh, ‘Fragmentation within international human rights law’, in M. Andenas and E. Bjorge (eds.), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press, Cambridge 2015), p. 307.

³⁴ Charters, *supra* note 149, p. 300.

³⁵ G. Alfredsson, ‘A Frame an Incomplete Painting: Comparison of the Framework Convention for the Protection of National Minorities with International Standards and Monitoring Procedures’ 7:4 *International Journal on Minority and Group Rights* (2000) pp. 291-304.

structural bias”.³⁶ This section argues that the missions of the AC-FCNM and ECtHR are informed by the historical origins and goals of their respective instruments. IMR originated purely as a conflict prevention mechanism, whereas, the IHR regime was founded in response to the broader atrocities committed during the Second World War. Nonetheless, the preambles to the IHR and IMR instruments of the 20th Century suggest that the two regimes are underpinned by similar and complementary goals: ‘international peace and security’ and ‘liberal justice’.³⁷ While these goals are mutually reinforcing, the preambles to IMR instruments place more emphasis on ‘international peace and security’ than IHR instruments. For example, the preamble to the FCNM highlights that “the upheavals of European history have shown that the protection of national minorities is essential to stability, democratic security and peace in this continent”. Although the goals underpinning IHR instruments are not necessarily static,³⁸ this different emphasis, alongside the distinct historical origins of IHR and IMR, may lead the AC-FCNM and ECtHR to adopt divergent understandings of their respective missions. As this has the potential to result in institutional fragmentation, this section seeks to identify the missions of the AC-FCNM and ECtHR.

2.2.1 The Mission of the ECtHR

Many of the rights contained in IHR instruments adopted in the aftermath of the Second World War can be traced to concepts of morality and natural law.³⁹ Yet, the adoption of the instruments themselves was specifically motivated by the wish to maintain ‘international peace and security’.⁴⁰ In the context of the ECHR, democracy was understood to be the antidote to the threat posed to ‘international peace and security’ by “Fascism, Hitlerism and Communism”.⁴¹ The preamble, thus, establishes that the fundamental freedoms contained in the instrument “are best maintained ... by an effective political democracy”. As noted by Marks, “[a] bold line distinguished the democratic “we” from the totalitarian “they”, and a major, perhaps the major, aim of the Convention was now to keep things that way”.⁴² This link between the achievement of the rights contained in the ECHR and democracy remains today. In the *United Communist Party of Turkey* case, the ECtHR “pointed out ... that the Convention was designed to maintain and promote the ideals and values of a

³⁶ M. Koskeniemi, ‘The Fate of Public International Law: Between Technique and Politics’ 70:1 *The Modern Law Review* (2007) p. 6.

³⁷ Preamble ECHR. See also, Preamble Universal Declaration of Human Rights GA Res. 217A (III), UN Doc A/810 at 71 (1948); Preamble FCNM; Preamble UN Declaration on Minorities.

³⁸ G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, Oxford, 2007) p. 19.

³⁹ See generally, E. Bates, ‘History’, in D. Moeckli, S. Shah and S. Sivakumaran (eds.), *International Human Rights Law* 2nd Edition (OUP, Oxford, 2013) pp. 15-32; C. Tomuschat, *Human Rights: Between Idealism and Realism* 3rd Edition (OUP, Oxford 2014) p. 73.

⁴⁰ Letsas, *supra* note 38, p. 19.

⁴¹ Statement of M Teitgen (France) *Volume I: Preparatory Commission of the Council of Europe, Committee of Ministers Consultative Assembly 11 May-8 September 1949* (Martinus Nijhoff, The Hague, 1975) p. 40.

⁴² S. Marks, ‘The European Convention on Human Rights and Its “Democratic Society”’ 66:1 *British Yearbook of International Law* (1996) 209, p. 210.

democratic society”.⁴³ Consequently, the ECtHR’s jurisprudence suggests that it continues to understand its mission to be the protection of democracy in Europe.

The centrality of *democracy* to the mission of the ECtHR notably finds expression in the MSENs found in Articles 8-11 ECHR. Limitations on these rights must be “necessary in a democratic society”. Further, States are permitted a margin of appreciation on the basis of democratic decision-making processes.⁴⁴ However, the ECtHR adopts a ‘protective approach’ to ‘democratic rights’ such as the rights to freedom of expression;⁴⁵ association and assembly;⁴⁶ and the right to free and fair elections.⁴⁷ Limitations must be evidenced to be strictly necessary and States are only permitted a narrow margin of appreciation.⁴⁸ Democracy is, thus, central to the mission of the ECtHR and has underpinned its interpretation of rights.

2.2.2 The Mission of the AC-FCNM

The AC-FCNM’s interpretation of its mission is connected to the specialised nature of the FCNM. The prospect of inter-ethnic violence at the end of the Cold War led the proliferation of minority rights instruments and bodies in the 1990s. Thus, it is not surprising that ‘international peace and security’ remains central to justificatory narratives underpinning the IMR regime. Nonetheless, the AC-FCNM has emphasised that “the spirit of the Framework Convention is much wider and goes beyond conflict prevention”.⁴⁹ The approach of the AC-FCNM suggests that the FCNM continues to be underpinned by the complementary goals of ‘security’ and ‘justice’.⁵⁰ The key distinction between the ECtHR and AC-FCNM arises in relation to how these goals are understood to be best achieved - that is the mission of the institutions. The consistent narrative underpinning IMR, including the FCNM, suggests that the mission of the AC-FCNM is the preservation of minority identity. This dates back to the Permanent Court of International Justice, which linked the preservation of minority identity to “the possibility of living peaceably”.⁵¹ The AC-FCNM has, notably, recognised that States and the media often portray minority identity a threat,

⁴³ *United Communist Party of Turkey and others v. Turkey*, 30 January 1998, ECtHR, Judgment, para. 45 <hudoc.echr.coe.int/eng?i=001-58128>. See, further, J.-P. Costa, ‘The links between democracy and human rights under the case-law of the European Court of Human Rights’ Helsinki, (5 June 2008) p. 1 <www.echr.coe.int/Documents/Speech_20080605_Costa_Helsinki_ENG.pdf>.

⁴⁴ R. Spano, ‘Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity’ 14 *Human Rights Law Review* (2014) p. 499.

⁴⁵ Article 10 ECHR.

⁴⁶ Article 11 ECHR.

⁴⁷ Article 3, Protocol 1 ECHR.

⁴⁸ J.-P. Costa, ‘Protection of the Democratic Values in Administration of Justice’, Baku, 2 May 2008 cited in H.-M. ten Napel, ‘The European Court of Human Rights and Political Rights: The Need for More Guidance’ 5 *European Constitutional Law Review* (2009) 464, p. 478.

⁴⁹ Council of Europe, Framework Convention Advisory Committee, *Opinion on Georgia*, (19 March 2009) ACFC/OP/I(2009)001 para. 59 <www.coe.int/en/web/minorities/georgia>.

⁵⁰ E. Craig, ‘From Security to Justice? The Development of a More Justice-Oriented Approach to the Realisation of European Minority Rights Standards’ 30 *Netherlands Quarterly of Human Rights* (2012) pp. 40-64.

⁵¹ *Minority Schools in Albania*, PCIJ Series A./B. Advisory Opinion of 6 April 1935, p. 17.

either to society⁵² or the preservation of the majority's identity,⁵³ in order to legitimise human rights violations.⁵⁴ However, it has emphasised that interference with the rights of minorities on the basis of a perceived threat often prove to be counter-productive and undermine attempts at building peace.⁵⁵ If the goals of the regime are to be achieved, then the logic of IMR dictates that States must not attempt to assimilate minorities or unnecessarily interfere with their cultural, linguistic or religious practices. The mission of the AC-FCNM is, accordingly, the preservation of minority identity.

2.3 *The Causes of Institutional Fragmentation: The ECtHR and AC-FCNM*

A number of factors have been identified that have the potential to result in institutional fragmentation in the interpretation of MSENs by the ECtHR and AC-FCNM. While the ECHR and FCNM both pursue the goals of 'international peace and security' and 'liberal justice' (albeit with a different emphasis), there is a significant divergence in how the institutions tasked with implementing these instruments understand these goals are to be achieved. The ECtHR interprets its *mission* to be the protection of democracy, whereas the AC-FCNM interprets its *mission* to be the preservation of minority identity.

This divergence is not inherently problematic and will not automatically result in institutional fragmentation between the ECtHR and AC-FCNM. As suggested by Payandeh, "[s]uch a structural bias is ... not only understandable but also legitimate, since it is the basic *raison d'être* of specialized human rights regimes".⁵⁶ Yet, if the priorities of one institution collide rather than align with the priorities of the other institution, the ensuing fragmentation has the potential to not only impact the coherence of the IHR regime but also to undermine the legitimacy and effectiveness of the weaker regime.

3 MSENs and Institutional Fragmentation in Practice

Having established that the respective missions of the ECtHR and the AC-FCNM diverge, this section proceeds to consider whether this has resulted in institutional fragmentation, in practice, by reviewing the interpretation of MSENs in analogous

⁵² Council of Europe, Framework Convention Advisory Committee, *Third Opinion on Bulgaria* (11 February 2014) ACFC/OP/III(2014)001 para. 67 <www.coe.int/en/web/minorities/bulgaria>; Council of Europe, Framework Convention Advisory Committee, *Fourth Opinion on Denmark* (20 May 2014) ACFC/OP/IV(2014)001 para. 64 <www.coe.int/en/web/minorities/denmark>.

⁵³ Council of Europe, Framework Convention Advisory Committee, *Third Opinion on Estonia* (1 April 2011) ACFC/OP/III(2011)004 para. 76 <www.coe.int/en/web/minorities/estonia>; Council of Europe, Framework Convention Advisory Committee, *Second Opinion on Latvia*, ACFC/OP/II(2013)001 paras 63 and 80 <www.coe.int/en/web/minorities/latvia>.

⁵⁴ Council of Europe, Framework Convention Advisory Committee, *Fourth Opinion on Spain* (3 December 2014) ACFC/OP/IV(2014) 003 para. 42 <www.coe.int/en/web/minorities/spain>; Council of Europe, Framework Convention Advisory Committee, *Third Opinion on Kosovo* (6 March 2013) ACFC/OP/III(2013)002 paras. 91, 167 <www.coe.int/en/web/minorities/unmik/kosovo>.

⁵⁵ Council of Europe, Framework Convention Advisory Committee, *Third Opinion on Bosnia and Herzegovina* (7 March 2013) ACFC/OP/III(2013)003 para. 90 <www.coe.int/en/web/minorities/bosnia-and-herzegovina>.

⁵⁶ Payandeh, *supra* note 33, p. 318.

situations in the ECtHR's jurisprudence and the AC-FCNM's Opinions on State reports. The identified MSENs map on to the missions of the ECtHR and AC-FCNM and, thus, can either be broadly categorised as *democratic rights*, that is the right to freedom of expression, association and assembly; and *rights that facilitate the preservation of minority identity*, the right to manifest religion and the right to 'a way of life'. Notably, from the perspective of the AC-FCNM all identified rights pertain to the preservation of minority identity. It is argued that institutional fragmentation has resulted from the interpretation of MSENs by the AC-FCNM and ECtHR, as each institution prioritises its own mission. The identified fragmentation is significant, because although MSENs have the potential to be mutually reinforcing if interpreted consistently,⁵⁷ it can undermine the legitimacy of regimes if they are not.

3.1 Democratic Rights

The ECtHR has consistently emphasised the link between democracy and the freedoms of expression, association and assembly. In *Fressoz and Roire*, the ECtHR recognised that, "[f]reedom of expression constitutes one of the essential foundations of a democratic society".⁵⁸ Furthermore, it has stressed that the link between Articles 10 and 11 ECHR "applies all the more in relation to political parties in view of their essential role in ensuring pluralism and the proper functioning of democracy".⁵⁹ On the basis of the connection between these rights and democracy, the ECtHR has only permitted States a narrow margin of appreciation.⁶⁰

Moreover, the AC-FCNM has emphasised the connection between democracy and effective minority rights protection. For example, in relation to article 15 FCNM, it has noted that "[t]he degree of participation of persons belonging to national minorities in all spheres of life can be considered as one of the indicators of the level of pluralism and democracy of a society".⁶¹ This pluralist understanding of democracy aligns with that of the ECtHR, which has reiterated that "there can be no democracy without pluralism".⁶² Significantly, the ECtHR's interpretation of 'a democratic society' extends past simple majoritarian democracy⁶³ and embraces a pluralist conception that recognises the importance of minority participation.⁶⁴

States seeking to justify restrictions on the freedom of expression, association and assembly of minorities under the ECHR, often attempt to justify interference on the grounds of security, an area where States are usually permitted discretion.⁶⁵ Thus, Turkey has attempted to justify the proscription of Kurdish political parties and the

⁵⁷ Broude and Shany, *supra* note 13, p. 9.

⁵⁸ *Fressoz and Roire v. France*, 21 January 1999, ECtHR, Judgment, para. 45, <hudoc.echr.coe.int/eng?i=001-58906>.

⁵⁹ *United Communist Party case*, *supra* note 50, para. 43.

⁶⁰ *Costa*, *supra* note 48.

⁶¹ Council of Europe, Framework Convention Advisory Committee, *Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs* (5 May 2008) ACFC/31DOC(2008)001 para. 8, <www.coe.int/en/web/minorities/thematic-commentaries>.

⁶² *Refah Partisi (The Welfare Party) and others v. Turkey*, 13 February 2003, ECtHR, Judgment, para 89, <hudoc.echr.coe.int/eng?i=001-60936>.

⁶³ G. van der Schyff, 'The concept of democracy as an element of the European Convention' 28 *Comparative and International Law Journal of Southern Africa* (2005) p. 356.

⁶⁴ Ten Napel, *supra* note 48, p. 467.

⁶⁵ Letsas, *supra* note 38, p. 91.

prohibition of expressions that profess support for the Kurdish cause, on the basis that they support or pose a terrorist threat,⁶⁶ pose a threat to the territorial integrity of the State⁶⁷ and the democratic order.⁶⁸ Despite the seriousness of these claims, the ECtHR has consistently found violations of Articles 10 and 11 ECHR on the basis that the interference undermines democracy.⁶⁹ Specifically, in *United Community Party v Turkey*, the ECtHR held that

[d]emocracy thrives on freedom of expression. From that point of view, there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned.⁷⁰

Unless States are able prove that the applicant poses the asserted threat to democracy,⁷¹ the ECtHR has consistently prioritised the protection of the democratic rights of persons belonging to minorities.

Similarly, the AC-FCNM has expressed concern when States have sought to restrict political parties on the basis that they represent ethnic, national or religious minorities or specific territories.⁷² While recognising that such laws may be designed to reduce tensions and the potential for conflict, the AC-FCNM has expressed dissatisfaction when the “prohibition is so broad that it could limit legitimate activities aimed at the protection of national minorities by political parties”.⁷³ The AC-FCNM has specifically linked democratic rights to the goal of security. Thus, it has emphasised that minority political parties “make it possible for the concerns and interests of persons belonging to national minorities ... a factor that would contribute far more constructively than prohibition to fostering peaceful co-existence”.⁷⁴ Outside the political arena, both the AC-FCNM and ECtHR have interpreted ‘democratic rights’ to encompass elements of the right to preserve minority identity through expression, association and assembly, despite the portrayal of minority identity as a

⁶⁶ *Socialist Party and others v. Turkey*, 25 May 1998, ECtHR, Judgment, para. 38 <hudoc.echr.coe.int/eng?i=001-58172>.

⁶⁷ *United Communist Party case*, *supra* note 43, para. 40; *Ceylan v. Turkey*, 8 July 1999, ECtHR, Judgment para. 27 <hudoc.echr.coe.int/eng?i=001-58270>.

⁶⁸ *United Communist Party case*, *supra* note 43, para. 49;

⁶⁹ See for example, *ibid*; *Ceylan case*, *supra* note 67; *Sürek and Özdemir v Turkey*, 8 July 1999, ECtHR, Judgment, <hudoc.echr.coe.int/eng?i=001-58278>; *Ürper and others v. Turkey*, 20 October 2010, ECtHR, Judgment, <hudoc.echr.coe.int/eng?i=001-95201>.

⁷⁰ *United Communist Party case*, *supra* note 43, para. 57.

⁷¹ *Etxeberria and others v. Spain*, 30 June 2009, ECtHR, Judgment, <hudoc.echr.coe.int/eng?i=002-1509>; *Herri Batasuna and Batasuna v. Spain*, 30 June 2009, ECtHR, Judgment, <hudoc.echr.coe.int/eng?i=001-93475>. Cf. *Refah Partisi*, *supra* note 62, para. 104, which concerned the proscription of an Islamic political party. On the basis that there was a real and imminent prospect of the party being elected, the ECtHR adopted a less stringent evidentiary test.

⁷² Council of Europe, Framework Convention Advisory Committee, *Second Opinion on the Russian Federation* (11 May 2006) ACFC/OP/II(2006)004 para. 162 <www.coe.int/en/web/minorities/russian-federation>; Council of Europe, Framework Convention Advisory Committee, *Third Opinion on Moldova* (26 June 2009) ACFC/OP/III(2009)003 para. 97 <www.coe.int/en/web/minorities/republic-of-moldova>.

⁷³ *Second Opinion on the Russian Federation*, *ibid*.

⁷⁴ *Third Opinion on Bulgaria*, *supra* note 52, para. 82.

threat in these cases.⁷⁵

The primary divergence between the AC-FCNM and ECtHR relates to structural discrimination. The AC-FCNM has not only “encourage[d] the authorities to design measures to improve the representation of national minorities in elected bodies, especially at national level”,⁷⁶ but has also identified the potential for structural discrimination to leave minorities with little choice but to resort to non-democratic means in order to be heard.⁷⁷ In contrast, the ECtHR has failed to identify that the design of democratic systems may serve to exclude minority parties,⁷⁸ despite this undermining the pluralism that it recognises to be central to democratic societies. More generally, the AC-FCNM has emphasised that restrictions on democratic rights are often underpinned by discrimination and securitized portrayals of minority political consciousness. It has expressed particular concern when minority rights advocates are convicted for high-treason,⁷⁹ and accused of being ‘traitors’, ‘extremists’ and ‘enemies of the government’.⁸⁰ In contrast, the ECtHR has consistently declined to consider whether the interference with the applicants’ democratic rights was discriminatory.⁸¹ In so doing, it fails to expressly acknowledge the aggravated nature of these violations and that States seek to legitimise rights violations by portraying minority identity and consciousness as a threat.

The AC-FCNM and ECtHR have, for the most part, interpreted MSENs that pertain to democracy in a compatible manner. A degree of divergence can be detected in the approach to discriminatory State practices. Yet these differences do not automatically suggest that there is fragmentation between the ECtHR and AC-FCNM. The specialised nature of the FCNM has arguably resulted in the AC-FCNM being more attuned to the specific issues that face minorities, as compared to the generalist ECtHR.

3.2 *The Preservation of Minority Identity*

As one of the two pillars of minority protection,⁸² the preservation of minority identity is integral to the realisation of the rights contained in the FCNM and the mission of the AC-FCNM.⁸³ While no express right to preserve minority identity exists in the

⁷⁵ *Sidiropoulos and others v. Greece*, 10 July 1998, ECtHR, Judgment, paras. 44-47 <hudoc.echr.coe.int/eng?i=001-58205>; *Association Ekin v. France*, 17 July 2001, ECtHR, Judgment, para. 63, <hudoc.echr.coe.int/eng?i=001-59603>; *Gorzelik and others v. Poland*, 17 February 2004, ECtHR, Judgment, para. 93, <hudoc.echr.coe.int/eng?i=001-61637>; *Second Opinion on the Russian Federation*, *supra* note 72, paras. 157-161; Council of Europe, Framework Convention Advisory Committee, *Third Opinion on Azerbaijan* (10 October 2012) ACFC/OP/III(2012)005 para. 66, <www.coe.int/en/web/minorities/azerbaijan>.

⁷⁶ Council of Europe, Framework Convention Advisory Committee, *Second Opinion on Armenia* (12 May 2006) ACFC/OP/II(2006)005 para. 133 <<http://www.coe.int/en/web/minorities/armenia>>.

⁷⁷ *Third Opinion on Bulgaria*, *supra* note 52.

⁷⁸ *Yumak and Sadak v. Turkey*, 8 July 2008, ECtHR, Judgment, Joint Dissenting Opinion of Judges Tulkens, Vajić, Jaeger and Šikuta para. 5 <hudoc.echr.coe.int/eng?i=001-87363>.

⁷⁹ *Third Opinion on Azerbaijan*, *supra* note 75.

⁸⁰ *Ibid.*, paras. 50, 60; Council of Europe, Framework Convention Advisory Committee, *Third Opinion on the Russian Federation* (24 November 2011) ACFC/OP/III(2011)010 para. 132 <www.coe.int/en/web/minorities/russian-federation>.

⁸¹ *United Communist Party case*, *supra* note 43, para. 62; *Sidiropoulos case*, *supra* note 75, para. 52; *Association Ekin case*, *supra* note 75, para. 65; *Ceylan case*, *supra* note 67, paras. 39-42.

⁸² *Minority Schools in Albania case*, *supra* note 51.

⁸³ Article 5 FCNM

ECHR, such a right is implicitly contained in Articles 8 and 9 ECHR.⁸⁴ Both institutions have identified that majorities often seek to restrict the preservation of minority identity. Notably, the AC-FCNM has recognised that this may be motivated by a perceived threat to societal culture of the majority.⁸⁵ Furthermore, the ECtHR has established that “democracy does not simply mean that the views of a majority must always prevail”.⁸⁶ However, in practice, the ECtHR has permitted States a wide margin of appreciation to limit these MSENs, an approach that prioritises majoritarian democracy above the right of minorities to preserve their identity.

The AC-FCNM has been particularly cognisant that majority opposition to the expression of minority identity may be underpinned by a perceived threat: “Muslims, report that there is little understanding and knowledge in society in general of their religion, which is sometimes aggravated by increased stereotyping in society of Muslims as extremists. These hostile attitudes can infringe the freedom to manifest one’s religion or belief, as protected by Article 8 of the Framework Convention.”⁸⁷ Majoritarian intolerance against *hijab* wearing Muslim women has been identified by the AC-FCNM as discriminatory and undermining the right to preserve minority identity.⁸⁸ Moreover, it rejected the UK’s argument that limitations on the wearing of the *niqab* in State schools were justified on the grounds of security.⁸⁹ Instead it encouraged the government to consult religious minorities before adopting restrictive policies,⁹⁰ in order to reduce the potential for majoritarian intolerance to interfere with the preservation of minority identity.

In contrast, the ECtHR has consistently accepted that manifestations of Islam pose a threat to societal values such as gender equality and secularism.⁹¹ Most notably, the ECtHR has permitted States a wide margin of appreciation to restrict religious manifestations on the basis that secularism is a founding principle of the democratic State.⁹² In practice, this means that the ECtHR accepts the legitimacy of the interference with the applicant’s rights without evidence of the threat posed.⁹³ Thus, the margin of appreciation has led democratic values to be prioritised above the right

⁸⁴ Berry, *supra* note 30, pp. 9-11.

⁸⁵ *Third Opinion on Estonia*, *supra* note 53, para 76.

⁸⁶ *Young, James and Webster v. the United Kingdom*, 13 August 1981, ECtHR, Judgment, para. 63, <hudoc.echr.coe.int/eng?i=001-57608>.

⁸⁷ Council of Europe, Framework Convention Advisory Committee, *Third Opinion on Ukraine* (22 March 2012) ACFC/OP/III(2012)002, para. 84 <www.coe.int/en/web/minorities/ukraine>.

⁸⁸ *Third Opinion on the Russian Federation*, *supra* note 80, paras. 91 and 151; Council of Europe, Framework Convention Advisory Committee, *Third Opinion on Spain* (22 March 2012) ACFC/OP/III(2012)003, para. 75, <www.coe.int/en/web/minorities/spain>.

⁸⁹ Council of Europe, Framework Convention Advisory Committee, *Second Opinion on the United Kingdom* (26 October 2007) ACFC/OP/II(2007)003, paras. 158, 161, <www.coe.int/en/web/minorities/united-kingdom>.

⁹⁰ *Ibid.*, para. 161.

⁹¹ *Dahlab v. Switzerland*, 15 February 2001 ECtHR, Admissibility Decision, <hudoc.echr.coe.int/eng?i=001-22643>; *Şahin v. Turkey*, 10 November 2005, ECtHR, Judgment, paras. 114-15 <hudoc.echr.coe.int/eng?i=001-70956>; *Dogru v. France*, 4 December 2008, ECtHR, Judgment, para. 72, <hudoc.echr.coe.int/eng?i=001-90039>.

⁹² *Dogru* case, *ibid.*, para. 72.

⁹³ *Dahlab* case, *supra* note 91; *Şahin* case, *supra* note 91, Dissenting opinion of Judge Tulkens para. 8; *Dogru* case, *ibid.*, para. 44; *Ebrahimian v. France*, 26 November 2016, ECtHR, Judgment, para. 71, <hudoc.echr.coe.int/eng?i=001-159070>.

of religious minorities to manifest their religion. The only instance in which the ECtHR has found a violation in a case concerning the right of Muslim women to wear the *hijab*, related to the requirement that an elected official remove the *hijab* in order to take up office. In *Kavakçı v Turkey*, the ECtHR prioritised the democratic will of the people above the secular nature of State institutions under Article 3 Protocol 1 ECHR.⁹⁴ This evidences the central role played by democracy in the ECtHR's interpretation of rights.

The ECtHR has been willing to defer to democratic decision-making process, even when such processes appear to disclose majoritarian intolerance. Thus, in *Buckley v United Kingdom*, the ECtHR deferred to the decisions of the local planning authorities, despite the apparent prejudice against travellers that had underpinned the decision-making process.⁹⁵ Furthermore, the perceived failure of Muslim minorities to integrate and the threat this poses to societal security has also been invoked to justify limitations on the right to manifest religion.⁹⁶ Specifically, in *SAS v France*, the ECtHR deferred to the State's margin of appreciation, on the basis that the *burqa* ban was adopted following a democratic process.⁹⁷ However, it also expressly noted that the democratic process gave expression to majoritarian intolerance and served to ostracise the Muslim minority.⁹⁸ The majoritarian interpretation of democracy adopted by the ECtHR in these cases is, notably, inconsistent with the pluralist vision that it promotes under democratic rights.

In direct contrast, the AC-FCNM has recognised that the failure to provide appropriate stopping sites for travellers in the UK has the potential to result in or exacerbate tensions and conflict between minority and majority and, thus, undermine the goal of security.⁹⁹ It has also identified that the portrayal of minority identity as a threat has the potential to result in interference with rights. Consequently, it has clearly stated "that any limitation of rights of persons belonging to national minorities through majority decisions such as referenda contradicts the very essence of the Framework Convention".¹⁰⁰ The AC-FCNM has further recognised that majoritarian intolerance creates insecurity amongst the minority in question, which has the potential to have a 'freezing effect' on the exercise of minority rights.¹⁰¹ Therefore,

⁹⁴ *Kavakçı v. Turkey*, 5 April 2007, ECtHR, Judgment, paras. 43-46, <hudoc.echr.coe.int/eng?i=001-80024>.

⁹⁵ 'I consider it important to keep concentrations of sites for gypsies small, because in this way they are more readily accepted by the local community'. *Buckley v. United Kingdom*, 29 September 1996, ECtHR, Judgment, para. 80 <hudoc.echr.coe.int/eng?i=001-58076>. For further analysis, see, R. Sandland, 'Developing a Jurisprudence of Difference: The Protection of the Human Rights of Travelling Peoples by the European Court of Human Rights', 8 *Human Rights Law Review* (2008) p. 483.

⁹⁶ *SAS v. France*, 1 July 2014, ECtHR, Judgment, paras. 121-22 <hudoc.echr.coe.int/eng?i=001-145466>; *Osmanoğlu and Kocabaş v. Switzerland*, 10 January 2017, ECtHR, Judgment, paras. 96-7 <hudoc.echr.coe.int/eng?i=001-170436>.

⁹⁷ *SAS case*, *ibid.*, para. 154.

⁹⁸ *Ibid.*, para 149.

⁹⁹ Council of Europe, Framework Convention Advisory Committee, *Third Opinion on the United Kingdom* (30 June 2011) ACFC/OP/III(2011)006, para. 89 <www.coe.int/en/web/minorities/united-kingdom>.

¹⁰⁰ *Second Opinion on Latvia*, *supra* note 53, para. 71

¹⁰¹ Council of Europe, Framework Convention Advisory Committee, *Opinion on Kosovo* (25 November 2005, ACFC/OP/I(2005)004 para. 62 <www.coe.int/en/web/minorities/unmik/kosovo>.

the AC-FCNM has emphasised that it is the role of the State to improve intercultural understanding rather than restricting the rights of minorities on the basis of the prejudice of the majority.¹⁰² This approach aims to reduce interference with the identity of minorities on the basis of a perceived threat.

Fragmentation has occurred between the ECtHR and AC-FCNM in the interpretation of MSENs that pertain to the preservation of minority identity. This can be attributed to the diverging missions of the two bodies. The AC-FCNM has expressly recognised that democratic decision-making has the potential to legitimise the intolerance of the majority and undermine the right of minorities to preserve their identity. Rather than pandering to the prejudice of the majority, the AC-FCNM requires that States adopt measures to reduce intolerance. In contrast, the ECtHR, in accordance with its mission, has prioritised majoritarian democracy through the margin of appreciation ahead of the right of minorities to preserve their identity. Yet, as noted by Benvenisti “[a]cquiescing to the margin of appreciation of national institutions ... assists the majorities in burdening politically powerless minorities”.¹⁰³ The ECtHR’s interpretation of rights pertaining to the preservation of minority identity undermines the mission of the AC-FCNM.

4 Reconciling the Competing Missions of the AC-FCNM and ECtHR

This article has established that the diverging missions of the AC-FCNM and the ECtHR, have resulted in fragmentation in the interpretation of MSENs pertaining to the preservation of minority identity. While fragmentation is not always problematic, in this instance, the ECtHR has undermined both the *raison d’être* of the FCNM and the legitimacy of the AC-FCNM. Thus, this section explores the potential for reconciling the competing missions of the AC-FCNM and ECtHR.

As there is no automatic hierarchy between regimes in international law, reference should be made to the Vienna Convention on the Law of Treaties (VCLT) and the concept of systemic integration to determine which regime should be given priority in cases of fragmentation. However, as is revealed in this section, these principles do not provide an adequate framework to resolve the identified fragmentation between the AC-FCNM and ECtHR, due to the nature of the systemic differences. Instead, it is argued that actors within the two regimes should turn to inter-institutional dialogue in order to mitigate the impact of their diverging missions.

It is important to emphasise at the outset that uniformity of interpretation is not necessarily desirable. Contextual factors, including, the type of norms and the mandates of the two institutions, are likely to continue to result in disparate interpretations of MSENs.¹⁰⁴ In the context of IHR, uniformity is not necessarily desirable as it has the potential to prioritise Western hegemonic interpretations of rights and undermine pluralism.¹⁰⁵ Indeed, an approach that favours complete uniformity is likely to prioritise the interpretations emanating from generalist human rights bodies and disregard the *raison d’être* of specialised regimes, the development

¹⁰² *Second Opinion on Latvia*, *supra* note 53, para. 74.

¹⁰³ E. Benvenisti, ‘Margin of Appreciation, Consensus and Universal Standards’, 31 *New York University Journal of International Law and Politics* (1998-1999) p. 847.

¹⁰⁴ Rachovitsa, *supra* note 19, p. 12.

¹⁰⁵ Linxinski, *supra* note 20, p. 112.

of subject-specific expertise. Nonetheless, conflicting interpretations of MSENs remain problematic as they can undermine the legitimacy of a regime and lead to non-compliance with the most onerous interpretation of standards.¹⁰⁶

Article 30(2) VCLT establishes that “[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail”. To this end, Articles 19 and 23 FCNM afford priority to the ECHR in relation to both the interpretation of substantive rights and the scope of permissible limitations and derogations. This eliminates the need to consult the principles of *lex posterior* and *lex specialis*,¹⁰⁷ which would afford priority to the provisions of the FCNM as the more recent and specialised instrument. Nonetheless, this should not afford the ECHR absolute priority over the FCNM. As noted previously, there can never be true normative equivalence due to the different nature of the rights contained in the ECHR and FCNM. Furthermore, the mandates of the AC-FCNM and ECtHR mean that these rights are not interpreted in comparable contexts. It is also of note that the ECtHR is not bound by these clauses and, therefore, is able to defer to the AC-FCNM’s interpretation of MSENs, should it so wish.

Complete deference to the ECtHR’s interpretation of MSENs is also undesirable as it has the potential to establish the Court as a hegemonic regime. While there is theoretically no hierarchy between IHR treaties, the ECHR system is often perceived to be the most successful and powerful.¹⁰⁸ Indeed, the priority afforded to the ECHR in Article 23 FCNM reflects the position of the ECHR within the Council of Europe system, as the primary and founding document. Yet, it would be counterintuitive for Article 23 FCNM to require that the AC-FCNM adopt an interpretation of an MSEN that directly undermines its mission. Thus, while the drafters of the FCNM attempted to avoid fragmentation between the ECHR and FCNM by prioritising the ECHR, in practice, this clause is too crude to reconcile the diverging missions of the AC-FCNM and ECtHR.

Systemic integration is perhaps a more nuanced method for reconciling conflicting interpretations of MSENs.¹⁰⁹ Article 31(3)(c) VCLT establishes, in relation to the interpretation of treaty provisions, that, “[t]here shall be taken into account, together with the context: . . . (c) any relevant rules of international law applicable in the relations between the parties”. Former President Costa of the ECtHR, has suggested that judges in the ECtHR are aware that the “Convention is not a solitary instrument, but one element in a broader constellation of conventions and other texts developed by the Council of Europe”.¹¹⁰ Indeed, the ECtHR has, in practice, referred to the interpretation of MSENs by other human rights bodies particularly specialised regimes.¹¹¹ Yet, although systemic integration appears to be a promising mechanism

¹⁰⁶ Charters, *supra* note 14, p. 300.

¹⁰⁷ R. Michaels and J. Pauwelyn, ‘Conflict of Norms or Conflict of Laws? Different Techniques in the Fragmentation of International Law’, in Young (ed.), *supra* note 3, pp. 33-5.

¹⁰⁸ See for example, E. Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (OUP 2010) p. 2.

¹⁰⁹ See generally, C. McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ 54:2 *International and Comparative Law Quarterly* (2005) pp. 279-320.

¹¹⁰ Costa, *supra* note 43, p. 2.

¹¹¹ See generally, A. Rachovitsa, ‘Fragmentation of International Law Revisited: Insights, Good Practices, and Lessons to be Learned from the Case Law of the European Court of Human Rights’ 28 *Leiden Journal of International Law* (2015) pp. 863-885; M. Forowicz, ‘Factors influencing the reception of international law in the ECtHR’s case law: an overview’, in Andenas

to reconcile the conflicting interpretation of MSENs by the AC-FCNM and ECtHR, this also raises a number of difficulties. Charters has, for example, noted that when instruments are subject to evolutive interpretation, systemic integration may aggravate rather than relieve uncertainty because interpretations are not static.¹¹² The programmatic nature of the rights contained in the FCNM exacerbates this uncertainty and, therefore, has the potential to undermine any attempt at reconciling the interpretation of MSENs. Furthermore, Council of Europe States have consistently refused to adopt an Additional Protocol to the European Convention on Human Rights on National Minorities.¹¹³ Thus, the use of systemic integration to bring minority rights within the jurisdiction of the ECtHR is likely to be viewed as inappropriate.¹¹⁴ Indeed, historically, the ECtHR has been reluctant to refer to the FCNM, on the basis of a lack of consensus on the issue.¹¹⁵

Nonetheless, the majority of States party to the ECHR have now ratified the FCNM¹¹⁶ and the ECtHR has on occasion referred to the AC-FCNM's Opinions in relation to a specific State in order to establish the prevailing situation and guide its reasoning.¹¹⁷ However, the ECtHR refers to the AC-FCNM selectively and in a manner that suggests that it does so to increase its own legitimacy rather than to improve the coherence of the system. For example, in *DH and others*, the Grand Chamber of the ECtHR appears to have referred to the Opinions of the AC-FCNM because the original Chamber decision had been heavily criticised.¹¹⁸ Moreover, it is possible to identify other cases, such as *V.C. v Slovakia*, concerning the forced sterilisation of Roma women, where reference to the AC-FCNM's Opinions on State Reports would have allowed the ECtHR to identify systematic discrimination, but the ECtHR failed to recognise their relevance.¹¹⁹

It is also significant that the cases where the ECtHR has referred to the AC-FCNM did not relate to a perceived clash between democracy and the preservation of minority identity. In instances involving such a clash, systemic integration is likely to prove unhelpful. Rachovitsa warns that "the principle is still shaped by - and possibly reinforces - existing institutional preferences and biases".¹²⁰ The diverging missions of the AC-FCNM and ECtHR are, therefore, likely to continue to influence how the two bodies interpret MSENs.¹²¹ Rather than enabling the specific expertise of the AC-

and Bjorge (eds.), *supra* note 33, p.201.

¹¹² Charters, *supra* note 14, p. 315.

¹¹³ See, generally, Berry, *supra* note 305, pp. 1-38.

¹¹⁴ S. Wheatley, 'Minorities under the ECHR and the construction of a "democratic society"', *Public Law* (2007) pp. 778-79.

¹¹⁵ *Chapman case*, *supra* note 18, para. 94.

¹¹⁶ With the exception of Andorra, France, Monaco, Turkey (neither signed nor ratified) and Belgium, Greece, Iceland, Luxembourg (signed but not ratified). On the ratification point, see, further, Forowicz, *supra* note 112, p. 213.

¹¹⁷ See, for example, *D.H. and others v. the Czech Republic*, 13 November 2007, ECtHR, Judgment, paras. 134, 192, 200, <hudoc.echr.coe.int/eng?i=001-83256>; *Oršuš and others v. Croatia*, 16 March 2010, ECtHR, Judgment, paras. 159-74 <hudoc.echr.coe.int/eng?i=001-97689>.

¹¹⁸ For criticism of the Chambers decision in this case, see further, M. Goodwin, 'D.H. and Others v. Czech Republic: a major set-back for the development of non-discrimination norms in Europe' 7:4 *German Law Journal* (2006) pp. 421-431; Hofmann, *supra* note 31.

¹¹⁹ *V.C. case*, *supra* note 27; *Third Opinion on the Slovak Republic*, *supra* note 27. For further discussion, see Berry, *supra* note 30, pp. 29-31.

¹²⁰ Rachovitsa, *supra* note 19, p. 4.

¹²¹ *Ibid.*, p. 19.

FCNM to be recognised and used to develop an interpretation of MSENs that reconciles the aims of democracy and the preservation of minority identity, systemic integration has the potential to reinforce the hegemony of the ECtHR.

The rules developed within public international law may not be appropriate to address the institutional fragmentation that has evolved between the AC-FCNM and ECtHR. Consequently, it is necessary to explore more pragmatic approaches to resolve fragmentation. A number of authors have promoted inter-institutional (or judicial) dialogue as a means to resolve institutional fragmentation, without promoting complete uniformity and hegemony.¹²² This includes reference to or acknowledgement of the work of other bodies in decision-making processes but can also include, for example, the establishment of fora to facilitate inter-institutional exchange and interaction. Such inter-institutional dialogue has the potential to reduce institutional fragmentation “by raising awareness of the practice of other bodies and clarifying the reasoning process”.¹²³ It is notable that Gilbert has argued that the adoption of ‘National Minority Sensitive Guidelines’ within the ECtHR may enable greater consistency between the ECtHR and AC-FCNM.¹²⁴ This author has expressed scepticism about this approach elsewhere,¹²⁵ on the basis that the ECtHR is likely to continue to assert its own institutional competence ahead of that of the AC-FCNM, despite the latter’s expertise. Thus, this approach has the potential to permit the ECtHR to continue to only refer to the AC-FCNM when it perceives that it would be advantageous to do so from the perspective of its own legitimacy.¹²⁶ If this were the case, then inter-institutional dialogue runs the risk of increasing the hegemony of the ECtHR. However, should a non-hegemonic starting point be identified, then the establishment of a mechanism to facilitate inter-institutional dialogue displays promise as a way to reconcile the competing missions of these two bodies.

Importantly such an approach does not seek to promote entirely uniform interpretations of MSENs across institutions, for the reasons previously outlined. A key element, however, is “sensitivity to jurisdictional overlap and the inclusion of justifications”.¹²⁷ This requires that interpreting institutions clarify the reasoning process and explain contextual differences that have led to apparently inconsistent interpretations of MSENs. Were the ECtHR to cogently justify a divergent interpretation of a MSEN by reference to the nature of the norms contained in the ECHR as compared to the FCNM and its mandate as compared to that of the AC-FCNM, it is possible to avoid legal fragmentation. Both interpretations would remain valid and States could not refer to the ECtHR’s judgments in order to justify non-compliance with the recommendations of the AC-FCNM, if they have accepted the complementary competence of both institutions through ratification. Thus, inter-institutional dialogue may prevent the ECtHR from undermining the legitimacy and authority of the AC-FCNM.

The establishment of a formal mechanism such as an inter-institutional working

¹²² Charters, *supra* note 14, p. 304; Linxinski, *supra* note 20, p. 102; P. Webb, ‘Factors influencing fragmentation and convergence in international courts’, in Andenas and Bjorge (eds.), *supra* note 33, p. 167.

¹²³ Webb, *ibid.*

¹²⁴ G. Gilbert, ‘Soft Solutions to a Hard Problem: Justiciable Minority Rights?’, 10 *European Yearbook of Minority Issues* (2011) p. 196.

¹²⁵ Berry, *supra* note 30, p. 34.

¹²⁶ Linxinski, *supra* note 20, p. 112.

¹²⁷ Charters, *supra* note 14, p. 313.

group, has the potential to provide a forum for the AC-FCNM and ECtHR to share information on the situation and challenges faced by minorities within Council of Europe member States. Actors within each institutions will become more aware of the work of the other institution and can seek clarification of diverging interpretations of MSENs. Over time, there is potential for this approach to result in improved understanding between the AC-FCNM and ECtHR and increased, but not complete, convergence in the interpretation of MSENs.

Nonetheless, for such inter-institutional dialogue to be successful, actors within each regime must be willing to engage with and learn from their counterparts. Specifically, they must be open and aware of different perspectives. As noted by Lang, “regime interaction must in part be directed towards the destabilization of the ‘principles of vision’”.¹²⁸ While the ECtHR currently displays unflinching commitment to democracy, its interpretation of the requirements of democracy is inconsistent. The pluralist vision of democracy employed by the ECtHR in cases concerning democratic rights is consistent with the mission of the AC-FCNM. It is the majoritarian vision of democracy adopted under the margin of appreciation in cases pertaining to the preservation of minority identity that is problematic. Were the ECtHR to readjust its interpretation of democracy from a majoritarian to pluralist vision in these cases, the prospect of reconciling the ECHR and FCNM would be greatly improved. By providing a forum for the ECtHR and AC-FCNM to engage on these issues, inter-institutional dialogue has the potential to facilitate this change, by highlighting the implications of the ECtHR’s inconsistent approach to ‘democracy’ for the AC-FCNM.

5 Conclusion

While the ECHR and FCNM both pursue the goals of ‘international peace and security’ and ‘liberal justice’, a number of factors have resulted in institutional fragmentation between the AC-FCNM and ECtHR. Systemic factors including the nature of the norms contained in each instrument and the mandates of their respective monitoring bodies have the potential to result in fragmentation. However, it is the interpretation of the respective missions of these bodies that has resulted in conflicting interpretations of MSENs in practice. While the mission of the AC-FCNM is the preservation of minority identity, the mission of the ECtHR is the promotion and protection of democracy. These missions are not *prima facie* incompatible and, indeed, do not conflict in relation to democratic rights. Yet, the ECtHR has directly undermined the mission of the AC-FCNM by permitting States a wide margin of appreciation, underpinned by a majoritarian vision of democracy, in cases pertaining to the preservation of minority identity. This is inherently problematic as it is incompatible with the *raison d’être* of the FCNM and States are likely to comply with the least onerous interpretations of human rights standards. Thus, the ECtHR has the potential to reduce compliance with the FCNM and undermine the authority and legitimacy of the AC-FCNM.

Inter-institutional dialogue has been identified as the most viable method of

¹²⁸ A.T.F. Lang, ‘Legal Regimes and Professional Knowledges: The International Politics of Regime Definition’, in Young (ed.), *supra* note 3, p. 134.

reconciling the competing missions of the ECtHR and AC-FCNM. Such an approach does not endeavour to create complete uniformity between the ECtHR and AC-FCNM, but rather seeks to ensure that both bodies adopt reasoned interpretations of MSENs, drawing on the available expertise and seek to justify and explain diverging interpretations of MSENs in order to avoid de-legitimising each other. Nonetheless, such an approach will require that the ECtHR shift from a majoritarian to pluralist vision of democracy in relation to rights pertaining to the preservation of minority identity and recognise the expertise of the AC-FCNM, contrary to its hegemonic tendencies.